

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

PRESIDENT AND FELLOWS
OF HARVARD COLLEGE,

Plaintiff,

v.

No.

STEVE ELMORE,

Defendant.

**COMPLAINT FOR
INJUNCTION AND DAMAGES**

Plaintiff President and Fellows of Harvard College (Harvard), by and through its undersigned counsel, alleges as follows for its Complaint against Steve Elmore.

INTRODUCTION

1. This action arises from Defendant Elmore's self-publication of a book that infringes fifty copyrighted Harvard photographs, includes more than one hundred personal snapshots of artifacts in Harvard's Peabody Museum in spite of Elmore's written agreement not to publish personal photographs, and falsely represents that the Peabody Museum authorized the photographs and the way they are presented.

2. Defendant Elmore is a Santa Fe dealer in Native American art who was given permission to conduct research at the Peabody Museum of Archaeology and Ethnology at Harvard University (Peabody Museum or Museum). Mr. Elmore wanted to take pictures of Museum artifacts for research purposes, and the Museum allowed him to do so under its standard research photography agreement. That written agreement allowed Elmore to use his snapshots for personal research but prohibited their publication. Like

other museums, the Peabody Museum requires that published photographs of its artifacts be professionally taken—or be in its judgment of sufficient quality and have its written approval—so that its collections and institutional standards are represented fairly and accurately. The agreement also requires that copyrights in all published photographs be owned by the President and Fellows of Harvard College.

3. Defendant Elmore signed this written agreement as a condition of being allowed to take photographs inside the Peabody Museum, promising to use them only for his research and promising never to publish his amateur photographs. Defendant Elmore has now violated that commitment by self-publishing a book containing more than one hundred of his low-resolution personal snapshots—which he misrepresents as authorized by the Museum—as well as fifty images derived from a previous Peabody Museum Press book.

4. The research photos Elmore published are not only of low resolution; many are blurry, washed out or inadequately lighted, or do not show the complete artifact. Some are obviously altered with Photoshop or similar image modification software. The images lack professional backdrops; many are depicted on storage shelf surfaces that do not provide a sharp contrast for the artifact, and whose white-gray color appears in photos as though it is dirty. It is to avoid being represented in this way that the Peabody Museum prohibits publication of personal research photos.

5. Elmore also failed to properly attribute his pictures of Peabody Museum artifacts. Attribution standards exist to allow other researchers to identify and follow up on a pictured artifact. Proper attribution is important to the Museum and is a condition of its

approval of photographs for publication. Defendant Elmore's inadequate attribution of Museum objects damages the Museum's reputation.

6. Worse, Defendant Elmore's publication makes it appear the Peabody Museum authorized his shoddy photographs and incomplete attributions. The book falsely states: "All these photographs and illustrations courtesy of the Peabody Museum of Archeology and Ethnology, Harvard University."

7. The Peabody Museum relies on its written photography agreement to protect the invaluable trust between institution and researcher—allowing use of the institution to advance individual research while preserving the institution's standards for presenting itself to the public and to the research community. Defendant Elmore's breach of that written agreement is causing immediate and irreparable damage to the Peabody Museum by publicly misrepresenting the Museum's collections and standards, and by spreading the false and damaging impression that the Museum endorses and approves incompetent photography and attributions.

8. Defendant Elmore also copied fifty photographs from a copyrighted 1981 Peabody Museum Press book, *Historic Hopi Ceramics*, created colorized versions of the photos, and reproduced these unauthorized derivatives in his book.

9. Elmore has ignored the Peabody Museum's repeated efforts to informally address these problems and to minimize the reputational damage being done to the Museum.

PARTIES AND JURISDICTION

10. The Peabody Museum of Archaeology and Ethnology at Harvard University contains 1.2 million objects and is one of the finest collections of human cultural history in

the world. It has comprehensive collections of North American ethnology, and one of these collections is the Thomas V. Kean Collection of pottery, which includes an important body of the work of the modernist Hopi potter Nampeyo (c. 1860–1942).

11. The Peabody Museum Press (the Press) is the publishing arm of the Peabody Museum, and has been active since 1888. The Press publishes original works in anthropology, archaeology, indigenous arts, material culture, and related topics.

12. Both the Peabody Museum and Peabody Museum Press are divisions of the President and Fellows of Harvard College, the oldest corporation in the western hemisphere, with its principal place of business in Middlesex County, Massachusetts.

13. Defendant Steve Elmore is a dealer in Native American art who resides in Santa Fe County, New Mexico. Upon information and belief, Defendant Elmore owns and operates Steve Elmore Indian Art, a gallery located at 839 Paseo de Peralta, Santa Fe, New Mexico. Upon information and belief, Spirit Bird Press is a name chosen by Defendant Elmore for self-publication of his book *In Search of Nampeyo: The Early Years, 1875-1892*, which violates United States copyright laws as well as Defendant Elmore's written contracts with the Peabody Museum.

14. Harvard brings this action for willful infringement of its registered copyrights under the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.*, for false designation of origin under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), and for breach of two written contracts between the parties.

15. This Court has jurisdiction pursuant to 17 U.S.C. § 501, 15 U.S.C. § 1121, and 28 U.S.C. §§ 1331 and 1338(a). This Court has supplemental jurisdiction over Harvard's contract claims under 28 U.S.C. § 1367(a).

16. The Court has personal jurisdiction over the Defendant because he resides in and does business in the State of New Mexico and in this District.

17. Venue is proper in this District under 28 U.S.C. §§ 1391(b) and 1400(a). Plaintiffs are informed and believe that the acts of infringement alleged herein occurred and continue to occur in this District.

ALLEGATIONS COMMON TO ALL COUNTS

18. Defendant Elmore was introduced to the Peabody Museum Press in 2010 as someone with expertise in the Hopi potter Nampeyo. Mr. Elmore believed the Peabody's Keam Collection included many of Nampeyo's early works that had not yet been identified as hers.

19. In August 2010, Defendant Elmore entered into a contract with the Peabody Museum Press to write a manuscript for the Press according to the specifications in the Peabody's "Collections Series Writer's Guide," for peer review and potential publication by the Press. The contract was clear that "The Museum will handle all photography . . . for the volume." The Press provided Defendant Elmore \$1500 to conduct research at the Peabody Museum.

20. Before visiting the Peabody Museum in 2011, Elmore signed the Museum's standard Permission to Visit Collections agreement, and, because he wanted to photograph Museum objects, he also signed the Museum's Permission to Photograph Collections (the Photography Agreement, attached hereto as Exhibit A). Each agreement is written in plain English and fits easily on one page.

The Photography Agreement

21. The Photography Agreement allows personal research photographs but prohibits their publication:

I agree that the photographs made by me at the Peabody Museum are solely for my own personal research use. *No such photographs made by me will be publicly exhibited in any manner or medium, or reproduced*, except for the following legitimate research purposes for which [Harvard] hereby grants permission:

- Non-commercial lecturing, as in teaching or at professional meetings;
- Unpublished documents such as research funding proposals or reports to research or sponsoring agencies;
- Undergraduate and graduate papers, theses, and dissertations;
- Circulation of pre-publication research materials to colleagues;
- Computerized database for my [Defendant's] own use.

Photography Agreement, Ex. A (emphasis added).

22. The Photography Agreement continued:

I understand and agree than *any other use of these photographs will require the prior written permission of the Museum* and shall be governed by the photographic policies of the Peabody Museum and Harvard University.

Photography Agreement, Ex. A (emphasis added). The Peabody Museum's photographic policies provided that a researcher could request permission to publish a research photograph, and the Museum could make exceptions for photographs of sufficient quality.

23. In the Photography Agreement, Defendant Elmore specifically agreed that his commitment not to publish was a condition of being allowed to take any photographs of Museum collections. Elmore further agreed to pay liquidated damages of \$10,000 per

photograph if he broke the agreement, and agreed that Harvard could specifically enforce the agreement:

I understand that if I do not agree to restrict my use of the photographs as set forth in this agreement, the Peabody Museum will not allow me to photograph objects from its collection. I further agree that if I breach the provisions of this Permission, I will pay Harvard the sum of \$10,000 as liquidated damages. In addition, I agree that Harvard may specifically enforce in any court of competent jurisdiction the obligations set forth in this Permission.

Photography Agreement, Ex. A.

24. Defendant Elmore signed the Photography Agreement on December 24, 2010, and visited and photographed artifacts in the Kean Collection shortly thereafter.

25. As Elmore wrote his manuscript and corresponded with the Peabody Museum Press staff, Elmore was reminded on more than one occasion that his personal photos served in the manuscript only to show the placement of particular illustrations, and if the manuscript were published, Harvard would replace his snapshots with professional photographs.

The Peabody Declines the Manuscript and Reverts Rights to Elmore

26. When Elmore submitted his manuscript it did not meet the Press's standards. The Press made several suggestions to help Elmore develop a suitable manuscript, and between 2012 and 2014 worked with him to try to make the manuscript publishable. Eventually in 2014, after lengthy review by the Press's Editorial Advisory Board and four manuscript readers, the Press wrote to Elmore to finally decline to publish his manuscript.

27. Because the Publishing Agreement had given the Press all Elmore's rights in the manuscript, the Press gave these rights back to Elmore in its letter declining

publication, and encouraged Elmore to publish the book elsewhere. The reversion letter did not alter or even mention the Photography Agreement. It did underline that personal photographs could not be published by offering to provide Elmore some professional photographs for publication: “The museum would be happy to provide you, without charge, 10 to 15 high-quality, existing photographs to use in such publication.” (Reversion Letter, attached hereto as Exhibit B.) Elmore never took the Press up on this offer.

**Elmore Publishes the Book Using his Research Photos
And Other Photographs Misappropriated from the Peabody Museum**

28. Early in 2015, Defendant Elmore emailed the director of the Peabody Museum Press a web page advertising Elmore’s forthcoming book *In Search of Nampeyo: The Early Years, 1875-1892* (the Infringing Book). The Press director wrote back immediately, thanking Elmore for the notice but asking what photography Elmore planned to include in the book, reminding him that his personal research photos could not be published, and expressing concern that the cover image in the advertisement appeared to be one of Elmore’s research photos.

29. Elmore responded that the Reversion Letter gave him the right to publish his book, and that right somehow included the right to publish his amateur photographs.

30. Upon obtaining a copy of the Infringing Book, the Peabody Museum discovered that in addition to publishing more than one hundred of his low-quality snapshots of Museum artifacts, Elmore also published at least two photographs misappropriated from the Peabody Museum’s own collections. The frontispiece of the Infringing Book is an old photograph of Nampeyo from the Peabody Museum’s collections, and Figure 8.6 in the Infringing Book is a large copy of an old postcard from the Peabody Museum. Defendant Elmore used these images without permission and in

violation of both his Photography Agreement and his research agreement with the Museum. That agreement, titled Permission to Visit Collections, which Elmore signed January 10, 2011 (the Research Agreement), provides, “Any copies of research materials (photographs, archival documents or other documentation) supplied by the Museum are for study purposes only and may not be reproduced without written permission.” Research Agreement, attached hereto as Exhibit C.

Elmore Also Copied 50 Photographs from *Historic Hopi Ceramics*

31. Further examination of Elmore’s Infringing Book revealed that Elmore also copied fifty photographs from one of the seminal academic works on Hopi pottery, *Historic Hopi Ceramics*, by Edwin L. Wade and Lea S. McChesney, published by the Peabody Museum Press in 1981.

32. Harvard has a copy of Mr. Elmore’s manuscript for the Infringing Book from his submission of it to the Press. In that manuscript Elmore used copied images from *Historic Hopi Ceramics* as placeholders for professional photographs of those pictured artifacts. The copies are clearly from *Historic Hopi Ceramics* because they show that book’s header and unique text around the copied images. While there was nothing wrong with Elmore’s use of the copies as placeholders in a manuscript submitted to the Press, Elmore had no permission to create derivative works from those photographs, much less to publish them.

33. When the Press declined his manuscript, Defendant Elmore appears to have had colorized versions of these fifty photographs made for the Infringing Book. The colorized derivatives in the Infringing Book are in each case of the same object, and have the same angle, scale, and depth of field as the photographs from *Historic Hopi Ceramics*.

34. Elmore published these unauthorized derivatives of photographs from *Historic Hopi Ceramics* at pages 88, 100, 101–03, 124–25, 131–33, 135, and 139 of the Infringing Book.

35. Harvard does not claim any copyright in the designs depicted in the photographs, but Harvard's copyright in the *Historic Hopi Ceramics* photographs does protect the original photographic rendition of each artifact.

36. The copyrights in all photographs in *Historic Hopi Ceramics* are owned by the President and Fellows of Harvard College. The book contains a copyright notice, and copyright in the book was registered upon publication, long before Defendant Elmore's copying.

37. Harvard never authorized Elmore's publication of *Historic Hopi Ceramics* photographs.

**Elmore Refuses to Acknowledge His Copying or
His Commitment not to Publish Personal Photographs**

38. Harvard has made repeated attempts to work with Mr. Elmore to address the unauthorized publication and to minimize the damage to the Peabody Museum's reputation. Harvard has made it clear that the Peabody Museum has no objection whatever to the substance of Defendant Elmore's book, and that its sole interest is that any published photographs of its collections be of professional quality, have its written approval prior to publication, and that copyright in such photographs belong to Harvard so that it can control piracy and infringement of works depicting its collections.

39. Defendant Elmore has refused to acknowledge any obligation to refrain from publishing personal photographs, taking the position that the Reversion Letter gave him the right to do so.

40. In response to Harvard's concerns, Defendant made matters worse by including an errata sheet in the Infringing Book which falsely states the Peabody Museum has authorized the photographs and endorsed the way they are presented in the Infringing Book.

41. Elmore has refused to respond in any way to claims about his copyright infringement.

42. Despite repeated requests that he stop offering the Infringing Book for sale, Elmore continues to do so, and is now selling the Infringing Book via Amazon and several Santa Fe museum gift shops.

COUNT I

COPYRIGHT INFRINGEMENT

43. Harvard re-alleges and incorporates by reference each of the foregoing allegations as though fully set forth herein.

44. Harvard owns registered copyrights in the photographs in Wade and McChesney, *Historic Hopi Ceramics*, published by the Peabody Museum Press in 1981.

45. Harvard never gave Defendant permission to publish photographs from *Historic Hopi Ceramics*.

46. Defendant copied photographs from *Historic Hopi Ceramics*, prepared unauthorized derivative works, and reproduced them without permission in the Infringing Book.

47. Defendant knew or should have known that such materials were protected by copyright laws.

48. Defendant willfully infringed the copyrights in the photographs published in *Historic Hopi Ceramics*.

49. Defendant's acts violate Harvard's exclusive rights under Section 106 of the Copyright Act of 1976, as amended, and constitute willful copyright infringement.

50. Defendant's past and continuing copying and distributing of photographs from *Historic Hopi Ceramics* is causing irreparable harm to Harvard.

51. Harvard has no adequate remedy at law.

COUNT II

BREACH OF CONTRACT

52. Harvard re-alleges and incorporates by reference each of the foregoing allegations as though fully set forth herein.

53. All conditions precedent to enforcement of the Photography Agreement and the Research Agreement have been satisfied or waived.

54. Defendant breached the Photography Agreement without justification, cause, or privilege to do so, by publishing personal photographs which Defendant was contractually prohibited from publishing.

55. Defendant breached the Research Agreement without justification, cause, or privilege to do so, by publishing the Nampeyo frontispiece and other images which Defendant was contractually prohibited from publishing.

56. As a direct and proximate result of Defendant's breaches, Harvard has suffered and is continuing to suffer irreparable harm.

57. As a direct and proximate result of Defendant's breaches, Harvard has suffered and is continuing to suffer damages in an amount to be proven at trial.

58. Defendant's actions were intentional, malicious, willful, and wanton.

COUNT III

FALSE DESIGNATION OF ORIGIN

59. Harvard re-alleges and incorporates by reference each of the foregoing allegations as though fully set forth herein.

60. Harvard owns registered and unregistered trademark rights in HARVARD UNIVERSITY®, PEABODY MUSEUM OF ARCHAEOLOGY AND ETHNOLOGY, and PEABODY MUSEUM PRESS for books and other goods and services.

61. Defendant's statements in the Infringing Book and its errata sheet, made in connection with the advertising, sale, offering for sale, distribution, and other exploitation of the Infringing Book and without Harvard's permission or consent, have created and will continue to create confusion among researchers and a false impression in the minds of the public that the Peabody Museum is somehow affiliated with Defendant, or that the Peabody Museum has approved, authorized, or endorsed the photographs and attributions in Defendant's Infringing Book, or the Infringing Book itself.

62. Defendant has made false representations, false descriptions, and false designations of origin in violation of 15 U.S.C. § 1125(a).

63. Defendant's activities have caused, and unless enjoined by this Court will continue to cause, a likelihood of confusion and mistake among members of the public as well as injury to Harvard's and the Peabody Museum's goodwill and reputation, for which Harvard has no adequate remedy at law.

64. Defendant's actions demonstrate an intentional, willful, and malicious intent to cause confusion, mistake, and deception, and to take advantage of the goodwill

and public recognition of Harvard and the Peabody Museum, for Defendant Elmore's own commercial advantage and to Harvard's irreparable injury.

WHEREFORE, Harvard prays judgment on its Complaint as follows:

A. For preliminary and permanent injunctive relief restraining and enjoining Defendant Elmore and his agents, servants, employees, representatives, partners, attorneys, and any and all persons acting by, through, or in concert with him or at his direction from:

(1) publishing, selling, offering for sale, or distributing the Infringing Book or otherwise using and infringing the copyrights of Harvard in any manner;

(2) publishing, distributing, or exhibiting in any manner, including in the Infringing Book, any photographs taken by Defendant Elmore of objects in the collections of Harvard;

(3) using PEABODY MUSEUM OF ARCHAEOLOGY AND ETHNOLOGY, PEABODY MUSEUM PRESS, HARVARD UNIVERSITY®, or similar or related marks or names in any way that falsely conveys that Plaintiff has approved, authorized, or endorsed the photographs or illustrations in the Infringing Book or the Infringing Book itself;

B. For liquidated damages of \$10,000 for each personal photograph published by Defendant in violation of the Photography Agreement;

C. For Harvard's other damages according to proof;

D. At Harvard's election, for statutory damages against Defendant, and an increase in the award of statutory damages due to Defendant's willful infringement, pursuant to 17 U.S.C. § 504(c);

E. For judgment against Defendant that his infringement of photographs was or is willful;

F. That Defendant be required to account for and disgorge to Harvard all gains, profits, and advantages derived from its unlawful conduct alleged herein;

G. That the amount of all monetary recovery be increased as provided by applicable law, up to three times;

H. For judgment against Defendant on all claims, including punitive damages and pre- and post-judgment interest as allowed by law;

I. For Harvard's attorneys' fees, expenses, and costs in this action; and

J. For such further relief as the Court deems just and proper.

Respectfully submitted,

SUTIN THAYER & BROWNE
A Professional Corporation

By /s/ Benjamin Allison

Benjamin Allison

Keith C. Mier

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kcm@sutinfirm.com

*Attorneys for the President
and Fellows of Harvard College*

Permission to Photograph Collections

In consideration of the Peabody Museum allowing me to photograph objects from its collection, I hereby agree to the following terms and conditions:

I agree that that the photographs made by me at the Peabody Museum are solely for my own personal research use. No such photographs made by me will be publicly exhibited in any manner or medium, or reproduced, except for the following legitimate research purposes for which the Peabody Museum hereby grants permission:

- non-commercial lecturing, as in teaching or at professional meetings;
- unpublished documents such as research funding proposals or reports to research or sponsoring agencies;
- undergraduate and graduate papers, theses, and dissertations;
- circulation of pre-publication research materials to colleagues;
- computerized database for my own use.

I understand and agree that any other use of these photographs will require the prior written permission of the Museum and shall be governed by the photographic policies of the Peabody Museum and Harvard University.

All uses of these photographs should include the full museum number and the credit line "Courtesy of the Peabody Museum of Archaeology and Ethnology, Harvard University."

I agree to provide the Peabody Museum with copies of these photographs free of charge upon request at any date.

I understand that if I do not agree to restrict my use of the photographs as set forth in this agreement, the Peabody Museum will not allow me to photograph objects from its collection. I further agree that if I breach the provisions of this Permission, I will pay Harvard the sum of \$10,000 as liquidated damages. In addition, I agree that Harvard may specifically enforce in any court of competent jurisdiction the obligations set forth in this Permission. The remedies of liquidated damages and injunctive relief shall be in addition to all other remedies available at law or in equity.

I attach a signed list of the objects photographed by me which includes the Peabody Museum identification number for each object.

I have read and agree to abide by the above conditions:

Signature	<u>Steve Elmore</u>	Date	<u>12/24/10</u>
Name	<u>STEVE ELMORE</u>	Title/Institution	<u></u>
Address	<u>1055 MANSION RINGE Rd - SANTA FE - NM - 87501</u>		
Phone/Fax/E-mail	<u>505-995-8896 - ollas77@aol.com</u>		

PMAE staff signature

PMAE Copy/Photographer Copy

Date

Revised 3/2010

EXHIBIT A



PEABODY MUSEUM PRESS

PEABODY MUSEUM
OF ARCHAEOLOGY & ETHNOLOGY
HARVARD UNIVERSITY

Steve Elmore
10055 Mansion Ridge Road
Santa Fe, NM 87501

January 21, 2014

Dear Steve:

This letter will serve as formal notification that the Peabody Museum of Archaeology and Ethnology hereby returns to you all rights in the manuscript "In Search of Nampeyo: The Apprenticeship of a Great Hopi Artist," including all versions of the manuscript submitted to the Peabody Museum Press.

After lengthy review of the revised manuscript you submitted to us in the fall of 2013, by the Press's Editorial Advisory Board and four manuscript readers, we have concluded that the project is not a fit with our editorial and publishing priorities and standards.

The Press and its Editorial Board feel that your approach to the materials in the museum's Hemenway/Keam collection is inappropriate for the Press's scholarly publication series. In the words of one of our board members, "We are an academic press, and this is not an academic book."

The Board recommends that you find a magazine or trade publisher that specializes in Southwest Indian art to publish the work. American Indian Art Magazine is one such venue, and I would support publication there. The museum would be happy to provide you, without charge, 10 to 15 high-quality, existing Peabody photographs to use in such publication.

I have to add, personally, that we tried very hard to make this project work, and I regret that we weren't able to. I deeply appreciate your patience, dedication, and endurance, and I look forward to talking with you in detail about the project, our decision, and possible publishing options for the work.

Yours sincerely,

A handwritten signature in dark ink, appearing to read "Joan O'Donnell", written over a horizontal line.

Joan Kathryn O'Donnell
Director
Peabody Museum Press

Elmore

THE MUSEUM of ARCHAEOLOGY & ETHNOLOGY
Peabody

Permission to Visit Collections

Permission to visit the artifact and document collections of the Peabody Museum is given to the researcher who signs this form. Permission is non-transferable. The researcher agrees not to disturb the order in which the collection is organized. No item is to be broken, marked, or otherwise altered from the condition in which it is found. The researcher has read and agrees to abide by the *Object Handling Guidelines* on the reverse of this form.

One copy of any book, article, thesis, catalogue, or other written or visual products resulting from this work must be donated to the Research Department upon completion of this research. When research involves collections from North American or Hawaiian tribes, it is requested that the researcher also donate a copy to the tribe(s).

The Peabody Museum may require that one copy of primary data remain at the Peabody Museum as a permanent record of research. The Peabody Museum will incur the cost of copying these data at the conclusion of the research visit. The Peabody Museum will not distribute these data without written permission from the undersigned researcher for a period of at least five years.

Any copies of research materials (photographs, archival or other documentation) supplied by the Museum are for study purposes only and may not be reproduced without written permission. This agreement does not constitute permission to photograph collections. An additional agreement, covering specific conditions of artifact photography, must be completed.

I have read and agree to the above conditions.

Name Steve Elmore Signature Steve Elmore Date 1/10/11

Institution Self

Title/Position _____

Address 1055 Mansion Ridge
SFE NM 87501

Phone (505) 995-9996 Fax _____ Email 04as77@aol.com

Collection Examined Kear

Purpose of Research Book for MAS

Peabody Staff Signature AK Date _____

OFFICE USE ONLY:

Type & Duration of visit res. 4.0 Visit-related time 2.0

Collection area(s) NA ethno Number of objects _____

Project completed ☐
 revised 5/08

Project in process ☐

CUTS entry ☐

with Sahnice

EXHIBIT C